1963

Right to Jury Trial in Ohio Civil Suits

Samuel M. Jones III

Right to Jury Trial in Ohio Civil Suits

*Samuel M. Jones, III**

IN MOST INSTANCES the right to a jury trial either clearly does or does not exist. Yet there are some instances where this constitutional[1] right is not clear. However, lawyers, pressed for time and more concerned with substantive issues, fail to argue the issue and thus it is rarely litigated.[2] Those lawyers who are concerned with the jury trial question, for tactical reasons or otherwise, are hampered by a dearth of material providing adequate guides in this area. This article is designed to fill this void.

The Pleadings Test

In that only legal causes of action are tried to a jury, a court must first determine whether the case is to be tried in equity or at law. To determine on which calendar the case should be placed, the courts resolve the problem as soon as the pleadings are closed. The general rule, as set forth in *Raymond v. Railway Company*,[3] "is not what was the understanding of counsel, . . . nor the form of judgment rendered," but rather what was the nature of the action, as shown by the pleadings.[4] The courts then compare the issues raised by the pleadings with similar cases as they would have been tried at common law prior to the adoption of the Ohio Constitution in 1803;[5] the so called "historical test." And at the same time the courts at least ostensibly look to Section 2311.04 of the Revised Code,[6] which defines the constitutional right to a jury:

---

* Of the law firm of Thompson, Hine & Flory of Cleveland.

1 Ohio Const. art. 1, § 5; see Work v. State, 2 Ohio St. 296 (1854), for a history of the constitutional right.

2 Most of the cases involved the question of the right to appeal, there being no such right, if the action was at law (prior to the enactment of Section 2502.23 of the Ohio Revised Code). *But see*, DeWees v. Spiliotis, 94 Ohio App. 58, 115 N. E. 2d 703 (1953) [Boswell v. Ruppert, 115 Ohio App. 201 (1961)] which are two examples of recent cases where the jury right has been litigated.

3 57 Ohio St. 271, 48 N. E. 1093 (1897).

4 *Id.* at 283.

5 Huling v. Columbus, 13 Ohio N. P. (n.s.) 409 (1912), aff'd. on other grounds by Walcutt v. Huling, 5 Ohio App. 326 (1913), aff'd. without opinion 92 Ohio St. 518 (1915).

6 The predecessor to this section was enacted in 1853 when Ohio adopted its version of the Field (New York) Code.

> Issues of fact arising in actions for the recovery of money only, or specific real or personal property, shall be tried by a jury, unless a jury trial is waived, . . .

In addition to the facts alleged in the pleadings, in many instances the plaintiff's prayer for relief is looked to in order to determine whether the case is at law or in equity; and a carefully drafted prayer may in some instances be determinative,[7] even though it has been held to be mere surplusage.[8] As recently as 1961[9] the desirability of relying on the facts alone and disregarding the prayer has been urged, although most cases have only cited the *Raymond* case and have been content with stating that the pleadings alone constitute the test. But in *Reed's Administrator v. Reed,*[10] the court suggested that a legal prayer improperly affixed to an equitable cause of action is not always surplusage and can have the ministerial or incidental role of advising the defendant "of what use the plaintiff intends to make of his alleged facts." [11]

Accordingly, where the facts make it easy for the court to determine the equity-law question, the demand for relief is of no worth. Where, however, the court has a more difficult choice to make, the decisions are not so conclusive. For example, when a cause of action entitles the plaintiff to either equitable or legal relief (*e.g.,* specific performance or damages in the alternative) the courts have placed more significance on the prayer. In *Grapes v. Barbour,*[12] the plaintiff sued on two counts, the first on a promissory note and the second a foreclosure of a mortgage. Before trial the plaintiff amended his petition so as to delete the prayer for recovery on the note. The court held that the parties were not entitled to a jury, obviously relying on plaintiff's prayer. Similarly, in *Corry v. Gaynor,* the court said in dictum that where

---

[7] In re Metropolitan Bank & Trust Co., 17 Ohio C. C. R. (n.s.) 324 (Ct. App. 1913), aff'd., 91 Ohio St. (1914); Magee v. Kiesewetter, 98 Ohio App. 539, 130 N. E. 2d 704 (1955).

[8] Corry v. Gaynor, 21 Ohio St. 277 (1871).

[9] Martini v. Cicatello, 74 Ohio L. Abs. 289 (Ct. App. 1955); Boswell v. Ruppert, 115 Ohio App. 201 (1961). Also see Foster v. Hartman, 23 Ohio C. C. R. (n.s.) 583 (1912), Dunn & Witt v. Kanmacher & Stark, 26 Ohio St. 497 (1875).

[10] 25 Ohio St. 422 (1874).

[11] *Id.* at 424. See Phillips, Code Pleading 312 (2nd Ed. 1932).

[12] 58 Ohio St. 669, 49 N. E. 306 (1898).

the plaintiff has two remedies, "the prayer may determine the character of the action, because it is itself an election." [13]

The question which *Grapes* and *Corry* did not have to answer was: What if the first prayer had not been removed and both an equitable and a legal prayer remained? Then the court should do as Judge Clark suggested: Force the plaintiff to elect a remedy rather than having the court construe his intent by interpreting the language of the demand for relief.[14]

Where Unclear Whether Law or Equity

Where at the time the pleadings are closed it is unclear whether the cause of action is in law or equity, the case of *Mahoning National Bank of Youngstown*[15] provides some hint of a workable solution. After pointing out that the facts and the relationships of the parties had undergone momentous changes since the first of many actions was commenced, the court said the nature of the action in the first instance is not determinative but rather,

> it is important only to ascertain its *present character* as determined by the issues made under the amended pleadings upon which the rights were *finally adjudicated at the time of trial.*[16]

Thus the court abandoned the usual test of examining the pleadings after they are framed. Instead, the court realistically looked to the case as it was tried before deciding the equity-law question and stated the basis for a new test: "Viewing the action *as it was ultimately tried,* it seems clear that it was a chancery action triable to the court. . . ." [17]

Where there is some doubt in the judge's mind before trial on the equity-law question or additional facts may arise to change the jurisdiction, the court should reserve decision on the

---

[13] 21 Ohio St. 277, 280 (1871). And it has been held that the plaintiff must make an election. Pierce, Assignee v. Stewart, 61 Ohio St. 422, 56 N. E. 201 (1900). Contra, Leyman Corp. v. Piggly-Wiggly Corp., 90 Ohio App. 506, 103 N. E. 2nd 399 (1951). But see Glander v. Mendenhall, 39 Ohio L. Abs. 104 (Ct. App. 1943); DeWees v. Spiliotis, 94 Ohio App. 394, 115 N. E. 2nd 703 (1953).

[14] Clark, The Complaint in Code Pleading 35 Yale L. J. 259, 289-90 (1926). Also see Brundidge v. Goodlove, 30 Ohio St. 374, 377 (1876), where "the plaintiff insisted upon a money judgment . . ." and was entitled to a jury.

[15] 143 Ohio St. 523, 56 N. E. 2d 218 (1944).

[16] *Id.* at 532. Emphasis added.

[17] *Id.* at 535-36. Emphasis added.

right to a jury and wait until after trial when the question can be unequivocally answered. The trial judge should place the case on the jury calendar with the intention that both the judge and the jury will hear the case, the judge to decide after the trial whose decision, judge or jury, shall be accepted. The case must be tried to both triers of fact, even though it may turn out that the parties have been subjected to unnecessary delay and expense if the case is held to be one in equity. On the other hand, if it is subsequently determined that the case was one at law, and a jury was not impaneled, the trial or appellate judge would be forced to rule for a new trial, which would be even more wasteful of time and money. Presenting the case before both judge and jury eliminates the necessity of a second trial, regardless of whether the case is found to be one at law or in equity. Further, the case will originally be placed on the jury calendar and the parties will not have to take the risk of being removed from the judge's calendar to the bottom of the jury calendar, if it should later be determined before trial that the case should be tried at law. Last, a party, who may not realize what his best remedy is until trial is over, will not have to take the risk of making a wrong choice and be collaterally estopped on the best remedy at a later trial.

Legislative Definition of the Jury Right

It appears that the statutory definition of the constitutional right to a jury trial may have encroached upon what was historically equity jurisdiction. In other words, Section 2311.04 extended the right beyond that which existed at common law. When the question arose as to whether or not the legislature could alter the constitutional definition of the jury right by enacting the predecessor to Section 2311.04, it was held in *Gunsaullus v. Pettit*[18] that where "money only" is requested, the jury right exists and "it is immaterial whether his right of action is based upon what were formerly regarded as equitable principles. . . ." [19] Thus, according to the *Gunsallus* ruling the jury right can exist even though historically the cause of action was in equity.

---

[18] 46 Ohio St. 27, 17 N. E. 231 (1888). Also see Brundidge v. Goodlove, 30 Ohio St. 374 (1876).

[19] *Id.* at 28-29.

Despite the abortive effort of a subsequent case[20] to prevent the courts from reading the language "money only" as applying to cases where demand for a money judgment would invoke equity, the court in *Improvement Co. v. Malone*,[21] reaffirmed that where the plaintiff was seeking "money only" a jury trial must be had as a matter of statutory right, even if equity might have taken over in the absence of the statute. But in *Huling v. Columbus*,[22] albeit a lower court, Judge Kinkead,[23] who admirably explained his decision in historical terms,[24] criticized the *Gunsaullus* and *Malone* cases. In *Gunsaullus* the suit was brought by the administrator of the deceased wife against the administrator of the deceased husband's estate for money which the defendant was to hold in trust and invest for the plaintiff. The court in *Gunsaullus* assumed that the case was in equity. Judge Kinkead said, however, that the trust relationship had nothing to do with the money relief sought; that when the defendant received the money a simple implied contract to repay arose, upon which the plaintiff could sue in assumpsit. Thus, argued Judge Kinkead, the *Gunsaullus* case, which stated that the statute could encroach upon chancery, was not relevant to the decision because assumpsit is at law; and the language concerning the right to encroach upon equity jurisdiction was only dictum.

In *Malone*, Judge Kinkead's dictum pointed out that the plaintiff sued for money on a contract, claiming equity jurisdiction because the items of account were numerous and required an equitable accounting; but the mere fact that there are numerous items in the accounting is not enough to invoke equity jurisdiction since, historically, there must be a proper relationship between the parties as well, such as a fiduciary relationship, which did not exist.

If *Huling v. Columbus* is followed, then equity and law as we know it will remain intact. Yet the *Gunsaullus* dictum has been resurrected. In *Herman v. Ohio Finance Co.*,[25] it was said in dictum that "The amount of money due from one to the other

---

[20] Black, Receiver v. Boyd, 50 Ohio St. 46, 33 N. E. 207 (1893), overruled by Improvement Co. v. Malone, 78 Ohio St. 232, 85 N. E. 51 (1908).

[21] *Ibid.*

[22] 13 Ohio N. P. (n.s.) 409 (1912), aff'd. on other grounds by Walcutt v. Huling, 5 Ohio App. 326, aff'd. without opinion 92 Ohio St. 518 (1915).

[23] Kinkead, Code Pleading (2nd Ed. 1898).

[24] 13 Ohio N. P. (n.s.) 415-16 (1912).

[25] 66 Ohio App. 164, 32 N. E. 2d 28 (1940).

was the major issue, and the accounting was incidental only to the main relief sought." [26] But there was no right to an accounting at all, and it cannot, therefore, be "incidental." By calling it incidental the court incorrectly implied that equity is relegated to a lesser position by the legal relief sought.

No express doctrine that Section 2311.04 encroaches upon equity, however, has ever been promulgated. But even if there is an encroachment upon equity, is it not just a ruling that a jury shall take the place of the judge in an equity trial? There is no reason why the legislature could not provide for jury trials in equity cases. Yet Section 2311.04 does not give such a mandate, and the legislature should speak with more certainty before such a reform is effected.

The fact is that many cases have been decided which give equity and law the proper respect due without even mentioning the dictum. In *Hull v. Bell Bros. & Co.*,[27] in which the buyer sought specific performance of a realty contract, the court held that such an action is traditionally one in equity though it might be argued that the plaintiff, who is the buyer, is seeking "the recovery of real property," as defined by Section 2311.04. A more plausible argument, however, can be made where it is the seller who brings the action for specific performance; he tenders his deed and seeks "money only" in return. But the courts[28] have held that the seller's action, too, is traditionally an equitable action for specific performance, in part because equities must be "determined" and "judicial discretion" [29] exercised by the court before a money judgment can be rendered. (And actions for specific performance are historically in equity regardless of statutory language, logic or policy.)

But why do not the courts spell out the historical test as Judge Kinkead did in *Huling v. Columbus*? Perhaps the judges of the late nineteenth and early twentieth century were so familiar with code pleading that the application of the test was taken for granted. The lawyer today who construes literally the language of Section 2311.04 finds himself confused when he attempts to match the statute against the unarticulated historical test. An example of court confusion is found in *Bricker v. Elliot*,[30] where

[26] *Id.* at 167.

[27] 54 Ohio St. 228, 43 N. E. 584 (1896).

[28] Pierce v. Stewart, 61 Ohio St. 422, 56 N. E. 201 (1900).

[29] *Id.* at 424-25. Also see Jones v. Booth, 38 Ohio St. 405 (1892).

[30] 55 Ohio St. 577, 45 N. E. 1045 (1897).

equity assumed jurisdiction because there was no adequate remedy at law. Yet the court in *Bricker* dealt with the fact that all the beneficiary wanted was "money only" from the trustee, from whom he was seeking an accounting. Reaching the right result with the wrong reason, the court said:

> But an action is not for the recovery of money only if it invokes the exercise of equitable jurisdiction, which must be found, if at all, in that prolific source of equitable jurisdiction—the inadequacy of legal remedies.[31]

The reason is wrong because the plaintiff was *not* seeking equitable relief, but only money. Equitable relief is only the means by which he seeks his end, *viz.* "money only." Section 2311.04 has nothing whatsoever to do with the means, i.e., the type of jurisdiction, which the plaintiff is forced to use. If the court in the *Bricker* case had used the statutory test and had disregarded the historical test, the result would have to be different; the parties would have to get their jury trial, and traditional equity jurisdiction would be encroached upon. That is because all the plaintiff was seeking was "money only," and according to the words of the statute it makes no difference if he had to go into equity to get it. What the court should have done before literally construing the naked language of the statute to justify its decision was to look to the intent of the drafters of the codes. The statute was intended only to codify the distinction between equity and law made by the common law prior to the adoption of the Constitution.[32]

Brick & Mining Co. v. Schatzinger,[33] which involved a contractual dispute between three parties, defends the historical test and demonstrates that it was not completely arbitrary. In holding that equity assumed jurisdiction the court said:

> The pleadings presented such a three cornered lawsuit that it could not possibly have been tried to a jury; that the rules governing jury trials would have prevented the *working out of the equities* which we conceive underlie the law-suit. . . .[34]

---

[31] *Id.* at 580.

[32] Huling v. Columbus, *supra* n. 22 at 415-416.

[33] 14 Ohio C. C. R. (n.s.) 356 (1905), aff'd. without opinion 74 Ohio St. 441, 78 N. E. 1136 (1906). Also see Martin v. Cicatello, 74 Ohio L. Abs. 289 (Ct. App. 1955).

[34] *Id.* at 357. Emphasis added.

Yet the *Schatzinger* case, too, had the same shortcoming that the *Bricker* case had. It cited the non sequitur that a suit requiring the invocation of equity is not a suit for "money only," even though money is all that the plaintiff is seeking. Once again, it is the lip service that is paid to Section 2311.04, and the court's feeling that it must twist the latter to concur with the historical test that is causing all the confusion.

Ultimately, the test is simple: Is equitable relief a *condition precedent*[35] for the plaintiff to acquire the ultimate relief that he is seeking? If not, the action is at law. In order to ascertain if equitable relief is a condition precedent, the historical test must be applied first.

Principal Relief Sought Test

Where the plaintiff prays for and is entitled to both equitable and legal relief, it appears at first blush that the courts have abrogated equity's jurisdiction. This is because in this two-headed action the courts have altered the common law historical test. The new test was first set out in *Chapman v. Lee*,[36] where, instead of holding that the plaintiff was entitled to both equitable and legal relief, the court apparently forced the plaintiff to make an election:[37]

> *What was the primary object sought?* If it was a judgment for money . . . and the allegations of the answers did not change the character of the case attempted to be made, *the mere fact that the petition contains allegations which seem to invoke some of the equity powers of the court, will not necessarily change the character of the action* . . .[38]

In the *Chapman* case attorneys were suing their former clients for legal services rendered, praying for both a money judgment, an equitable lien and an accounting for the money judgment the defendants had won in a former action. The court held that the plaintiffs were entitled only to a money judgment—an action at law—and that their allegations for equitable relief were "immaterial and unimportant."[39]

---

[35] Dreher v. Pattison Supply Co., 23 Ohio C. C. R. (n.s.) 54, 57 (1907).

[36] 45 Ohio St. 356, 13 N. E. 736 (1887).

[37] See note 13 *supra*.

[38] Chapman v. Lee, *supra* n. 36 at 363. Emphasis added.

[39] *Id.*

Despite the language quoted above, since the plaintiff was not entitled to any equitable relief at all, there could not be any encroachment on equity. The language in the *Chapman* case, "primary object sought," was ill-chosen, because there was no right to equitable relief at all. Thus the "primary object sought" test, which has its origin in the *Chapman* case, was dictum.

The confusion arose in those cases which followed the *Chapman* dictum, where the plaintiffs actually were entitled to both equitable and legal relief. Obviously troubled by the prospect of dual relief, and feeling that either equity or law should have exclusive jurisdiction, the courts seized upon the "primary object sought" or "principal relief sought" test. For example, in *Kiriakis v. Fountis*,[40] where the plaintiff sought cancellation of a promissory note for $1,500, an injunction preventing the transfer of the note, and a money judgment for $251.10 wrongfully withheld by the defendant, the court held that the main relief sought was a money judgment and the equitable relief only incidental. On remand the holding would first require a jury trial on the legal claim for money, which, if the plaintiff was to lose on it, might collaterally estop issues in the subsequent equity trial on the prayer for cancellation and injunction. Thus, by losing a trial for only $251.10 the plaintiff might find himself bound to pay an invalid note for $1,500. How could any court conclude that the latter is "incidental" to the claim for a relatively insignificant money amount? Even assuming that a determination of the "principal relief sought" must be made, in the *Kiriakis* case the "principal relief sought" was clearly equitable relief. Besides constituting a much larger sum of money, the equitable relief was prayed for first and the money relief last. If such a test must exist that which the plaintiff prays for first should give some indication of that which he considers to be "principal."

The *Kiriakis* case illustrates the dangers inherent in "the principal relief sought" test: How is the court to make the determination? What standards are to be used in doing so? Should not the plaintiff be asked, either by requiring him to make a more definite statement or by testifying orally in court, what he considers to be the "primary object" of his suit?

In *Wall v. Federation Co.*,[41] the plaintiff sued the company for wrongfully withholding his money. The plaintiff prayed for a

---

[40] 109 Ohio St. 553, 143 N. E. 129 (1923).

[41] 121 Ohio St. 334, 168 N. E. 847 (1929).

money judgment, an accounting, a receiver and an injunction to prevent the defendant from disposing of the property. The court's holding that the action was at law since money was the "main relief sought," [42] appears at first to be incorrect, particularly since a receiver and an injunction might have been needed immediately, long before the trial of the legal issue, so as to prevent the defendant from disposing of the money during the pre-trial period. But the equitable claims which the court called "incidental" and "ancillary" were dependent on the success of the plaintiff in the action at law for a money judgment. Before the plaintiff was entitled to an injunction and other equitable relief, the court had to determine that the defendant owed the money. Thus the court in *Wall* actually applied the "threshold issue" test instead of the ambiguous "principal relief sought" test. This is the language which the *Wall* case should have used, though it could be argued that the equitable issues are "ancillary" to the legal issues if one interprets "ancillary" as meaning "dependent on."

The court in *Nordin v. Coulton*[43] did, however, decide a case similar to the *Wall* case in language which came close to articulating the "threshold issue" test. Though the court first said that a money judgment was the "primary" or paramount relief asked by the plaintiff, the court went on to say: "Until he (plaintiff) is found entitled to a judgment in some amount, no foreclosure can be had . . ." [44]

The "threshold issue" test should be adopted, and when the equitable and legal claims sought are causally unrelated so as to fall outside the "threshold"-type fact situation, the plaintiff should designate which relief he wants, and not force the court to make the choice itself.

Yet despite the "principal relief sought" test, it appears that a party, by carefully framing two separate, distinct causes of action in his petition, can prevent equity from taking over the law issues, and thereby prevent a court from treating them as only "incidental." In *Bingham v. Nypano Rd. Co.*,[45] the plaintiff sought to have an employment contract reformed and then sue

---

[42] *Id.* at 337.

[43] 142 Ohio St. 277, 51 N. E. 2d 717 (1943). Also see Rowland v. Entrekin, 27 Ohio St. 47, (1875); Fisher v. Bower, 79 Ohio St. 248 (1909); Contra, Oetjen v. Goff-Kirby Co., 38 Ohio L. Abs. 117 (Ct. App. 1942).

[44] *Id.* at 278.

[45] 112 Ohio St. 115, 147 N. E. 1 (1925).

for damages on the contract as reformed. The trial court, sitting in equity, reformed the contract and then impaneled a jury, which awarded $12,000 to the plaintiff. Since the reformation of the contract was a condition precedent—a "threshold issue"—the equitable issue had to be tried first. But since the suit was not for "money only" and, indeed, required going into equity to reform the contract, the court could have tried the entire case before the judge, using the rationale that the "principal relief sought" was equitable and the legal relief was "incidental" thereto. But the court said that it had a separate jury trial because the case could have been divided into two lawsuits, and a party should not lose his jury right in the second because he joined two actions into one lawsuit.[46]

Defenses and Counterclaims

Where the defendant poses an equitable defense to a legal cause of action, the plaintiff may find that his jury right has been destroyed. In *Buckner v. Mear*,[47] the plaintiff sued the defendant for breach of covenants in a deed conveying realty. The defendant alleged that the covenants were inserted by mutual mistake and asked to have the deed reformed. The trial court decided the case by passing on the issues raised by the "counterclaim" [48] for the defendant, and the plaintiff appealed. In holding that the defendant's answer (or "counter-claim") changed the action from law to equity, the court said:

> (W)here new matter set up in the answer constitutes an equitable cause of action, which, if established, extinguished or supersedes the case made in the petition, the issues taken on such new matter are triable by the court, and not as of right by a jury.
>
> . . . If the equitable case should be established, the decree would end the whole controversy and settle the rights of the parties. But if the defendant should fail in his equitable case, the issues raised on the petition would have to be disposed of (with a jury trial) before the case could pass to final judgment.[49]

---

[46] Contra, Ellsworth v. Holcomb, 28 Ohio St. 66 (1875).

[47] 26 Ohio St. 514 (1875). Also see Smith v. Anderson, 20 Ohio St. 76 (1870); Bank v. Weygand, 30 Ohio St. 126 (1876); Raymond v. Railroad Co., 57 Ohio St. 271, 48 N. E. 1093 (1893); Gowdy v. Roberts, 31 Ohio App. 33, 166 N. E. 141 (1929); Deaconess Hospital v. Leutz, 12 Ohio L. Abs. 270 (Ct. App. 1932); Boswell v. Ruppert, 115 Ohio App. 201 (1961).

[48] *Id.* at 515.

[49] *Id.* at 516-17.

Indeed, once the contract was reformed and the covenants stricken, the plaintiff, who had sued upon the covenants which theretofore had existed, would no longer have a cause of action; and once the cause of action is gone there is no longer any constitutional right to a jury.

But *Buckner* was careful to point out that not "any new matter" in the defense could deprive the plaintiff of his jury right. It had to be new matter which would also make the defense a counter-claim, *viz.*, "facts recognized by courts of law or equity as constituting an existing cause of action. . . ." Yet *Gill v. Pelkey*[50] imposed an additional limitation and said not "*any* counter-claim" constituting a "distinct cause of action" can destroy the jury right. It must be one which requires "affirmative action" on the part of the court—a situation where in order to give the defendant full relief on his equitable defense the court must go into equity and alter the status quo, since law is historically prohibited from making such drastic changes. In other words, where a judgment voiding a debt is sufficient, this is not "affirmative relief"; but where the void debt is represented by an instrument which is not in the defendant's possession, an equitable decree commanding the possessor to hand over or destroy the instrument is "affirmative relief," necessary to give the successful defendant full protection. Thus, a jury can void a debt, but only "the interposition of a court of equity" [51] can reach out and destroy the instrument evidencing the debt.

Though the affirmative relief test is not illusory or shadowy, as Clark has written, it is true that it should not be labeled equitable defense and counterclaim at each pole, since these terms are equivocal and used interchangeably.[52] But the distinction should be kept intact to preserve that which equity could always do while law had its hands tied. Any labels can be used, and perhaps it would be best to call both "defenses," as Judge Clark suggested.[53] Nevertheless, some change is needed, for there are some instances where equitable defenses require a court trial first and counterclaims do not affect the plaintiff's jury right (and vice versa).

---

[50] 54 Ohio St. 348, 43 N. E. 991 (1896).

[51] Quebec Bank v. Weygand & Jung, 30 Ohio St. 126, 131 (1876).

[52] Clark, Code Pleading 430-31 (2nd Ed. 1947).

[53] *Id.* at 429.

The rule of *Buckner v. Mear*[54] is reversed when a petition states a cause of action in equity to which the defendant poses a legal counterclaim. In *Sallady v. Webb*,[55] plaintiff-assignee sought to foreclose a purchase money mortgage. The defendant-mortgagor answered, alleging that the mortgagee-assignor had induced him to purchase by misrepresenting the location of the boundaries, for which he sought damages. The court said that the plaintiff's cause of action was equitable and that the answer constituted a *legal* cross-demand. The court then held that the mortgagee-assignor owed the defendant an amount greater than that which the plaintiff-assignee sought in his original action. The court, after citing the *Buckner* case, applied the rule of the same case but with the equitable and legal claims in exactly reverse positions. The issue raised by the defendant's counterclaim, that he was induced to purchase by misrepresentation, reached to the issue of the making of the mortgage. Accordingly, if the defendant should win on his counterclaim, the entire contract would be invalidated and the plaintiff's cause of action would be "extinguished."

Why should the entire action take on the form of trial created by the issues raised in the counterclaim? Should not the plaintiff, he who takes the initiative to first file suit, be allowed the form of trial to which his cause of action entitles him? The courts have suggested two reasons: First, the "extinguishment" doctrine is based on historical experience that certain issues of fact are tried more efficiently by a jury than by a judge (and vice versa). Second, the fact that the plaintiff brings his action against the defendant before the latter gets to court to assert his claim does not give the plaintiff any vested right as to the form of trial.

Yet the plaintiff's legal or equitable cause of action is not completely destroyed by the *Buckner* and *Sallady* rule, but becomes contingent on his success in a court or jury trial on the issues raised by the defendant's counterclaim. Thus the *Buckner* and *Sallady* rule does not necessarily affect any substantive rights, but only the order of trials. Of course, if in actuality the defendant should win on the counterclaim, the plaintiff will be collaterally estopped by those issues decided adversely to him.

---

[54] *Supra* n. 48.

[55] 20 Ohio C. C. R. 553 (1887). Also see City National Bank v. Brown, 12 Ohio Dec. 62 (C. P. 1899).

The Jury Right and New Statutory Actions

If Ohio courts continue the practice of strictly construing the language of section 2311.04, in theory at least the constitutional right to a jury could be placed in jeopardy when trial by jury, as under common law, does not fit into the statutory categories of recovery of money *et al.* Probably the only common law cause of action with a jury right which would not meet the statutory requirements is that of an abatement of a nuisance, and this ancient cause of action has been abandoned in favor of injunctive relief in Ohio.

The jury right might, however, be encroached upon where a new action, similar to an action which existed at common law, is created by statute. In such instances, there is a doctrine that the Constitution protects the right to a jury only in those actions which existed prior to the adoption of the Constitution. In *Hauswirth v. Board of Review*,[56] the plaintiff was seeking unemployment compensation; the court held that the legislature did not provide for and the Constitution did not require a jury.

Similarly, in *Brawley v. Thomas, Admr.*,[57] where the plaintiff sought a finding that she was the wife of the deceased under the Determination of Heirship Act,[58] the court held there was no jury right because the action was within the jurisdiction of probate which has no provision for juries. The court further said that even though the recovery of money "may be the ultimate result . . . , that is the shadow and not the substance of the act." [59]

Yet the fact that a statutory action is passed subsequent to the adoption of the Constitution should not mean that in all cases a jury trial is precluded. Quite to the contrary, a jury right is often granted or denied by applying another test. For instance, in *In re Estate of Blue*,[60] the court went to some lengths to analogize the section of the probate code involving testamentary matters as they had been treated historically. Since they are traditionally in chancery, the court held the case should be tried before the probate judge.

---

[56] 69 Ohio App. 79, 43 N. E. 2d 240 (1941).

[57] 82 Ohio App. 400, 81 N. E. 2d 719 (1947).

[58] Ohio Rev. Code. ch. 2123.

[59] Brawley v. Thomas, Admr., *supra* n. 57 at 407.

[60] 67 Ohio App. 37, 32 N. E. 2d 499 (1939). Also see In re Estate of Helfrich, 30 Ohio N. P. (n.s.) 307 (C. P. 1933).

Conversely, the right to a jury under the Wrongful Death Act appears to have been arrived at by analogizing it to tort actions. Presumably, if the right did arise by analogy to an action in tort, the new right under the statute will be entitled to the same constitutional protection as the analogous common law action. In the Wrongful Death Act there is a brief mention of a jury trial, though the statute does not expressly say that there must be a right to a jury. Section 2525.02 of the Revised Code reads in part:

> The jury may give such damages as it thinks proportioned to the pecuniary injury resulting from such death to the persons.

Is this enough of a reference to a jury to make the right a statutory right and not a constitutional right arrived at by analogy to common law actions? Arguably, it cannot be both a constitutional and a statutory right because the Constitution protects only that right that existed before its adoption, and the statutory right (if it exists) was passed long afterwards. More reasonably, however, even where there is a reference to a jury trial in the act which creates the statutory cause of action, a court will construe the jury right as both a constitutional and a statutory right. The fact that the legislature chose to spell out the jury right in the statute may have been done because it feared that the courts would not find that the constitutional right existed by analogy; or it may have been added just as a statutory definition of the constitutional right which the legislature assumed already existed. The latter view, which is certainly the more tenable of the two, is identical to Section 2311.04's relationship to the constitutional right: The constitutional right and the statutory right are not mutually exclusive, both may exist concurrently.

This question is significant not only in considering the Wrongful Death Act but also in any statutory action which may have some slight reference to a jury. If it is a mere statutory right, then the legislature which creates it can take it away. In contrast, if it is a constitutional right, the right can only be destroyed by constitutional amendment. Thus, under the first interpretation, the legislature could take away the right to a jury in a Wrongful Death action, if the constitutional right was found not to exist. Section 2525.02 of the Wrongful Death Act is not, however, such a specific reference that could preempt the constitutional right which otherwise exists by analogy to the

common law action in tort. Instead, the quoted language of the section simply defines the duties of the jury, the existence of which the legislature assumed without question.

Last, besides applying the test of analogy the courts quite properly look to the mechanics of the statute creating the new statutory action. For example, *Kennedy v. Thompson*[61] held that the judgment which a statute calls for is of great significance. Since the judgment was "equitable in its nature," [62] the court found the action to be one in equity.

Waiver of the Right to a Jury Trial

A. *Waiver by Statute*

Section 2315.20 provides when parties have waived a jury trial:

> In actions arising on contract, trial by jury may be waived by the parties, and in other actions with the assent of the Court as follows:
>
> (A) By consent of the party appearing, when the other party fails to appear at the trial, in person or by attorney;
>
> (B) By written consent, in person or by attorney, filed with the clerk;
>
> (C) By oral consent in open court entered on the journal.

Accordingly, some kind of affirmative consent to waive is required *except* where a party fails to attend trial: If a party does not choose to exercise his right to defend himself, *a fortiori,* he should not have a right to a jury trial. Moreover, where a party fails to defend himself at trial it is most unlikely that the jury will find in his behalf; and even if it should, the judge would probably be compelled to grant a judgment notwithstanding the verdict.

The courts have rigidly adhered to the language of Subsection A of Section 2315.20 which requires appearance at the trial,[63] and have even held that a party must appear at trial even though he had previously demanded a jury in his answer.[64]

---

[61] 30 Ohio C. C. R. 446, 2 Ohio C. C. Dec. 254 (1888).

[62] *Id.*

[63] Railroad Co. v. Construction Co., 49 Ohio St. 681, 32 N. E. 961 (1892).

[64] Crellin v. Armstrong, 21 Ohio L. Abs. 295, 32 N. E. 2d 60 (Ct. App. 1936).

B. *Implied Waiver In General*

Section 2315.20 does not provide for the situation when parties go to trial without either expressly asking for a jury or expressly waiving, and then afterwards, asserting that they had been deprived of their jury right. *Bonewitz v. Bonewitz,*[65] held that waiver could be implied even though the express provisions of the statute had not been followed. The court stated that a "jury was not demanded" and, even though the right was not waived in words, "actions sometimes speak louder than words." [66]

In no way can a rule that waiver can come about by conduct or estoppel be inferred from the statute.[67] *Whitworth v. Steers,*[68] which preceded *Bonewitz,* implied that the statutory methods of effecting waiver were not exclusive. In order to reach the conclusion that statutory waiver is not exclusive, the court apparently read the word "may" in Section 2315.20 as being permissive, and therefore not exclusive.

Even before *Bonewitz* there was some authority which required a party to make an affirmative demand to preserve his right. In *Averill Coal & Oil Co. v. Verner,*[69] the court referred the case to a referee over defendant's objection. The court reasoned that a mere *objection* to a referral could not be equated to a *demand* for a jury, and the court held the jury right was waived. But in *Monroe v. Golner,*[70] the court held that an informal request for a jury trial was sufficient. Thus, an objection to the withdrawal of the jury, or any utterance which clearly demonstrates that a party wants a jury should take the case out of the *Bonewitz* doctrine.

C. *Implied Waiver Before Trial*

The dictum in *Younger & Co. v. Halliday*[71] states that an express waiver might be dissolved by a subsequent amendment of the pleadings. But in this case the court analyzed plaintiff's

---

[65] 50 Ohio St. 373, 34 N. E. 322 (1893).

[66] *Id.* at 377-78.

[67] Whitworth v. Steers, Ohio C. C. Dec. 556 (1893) aff'd. without opinion 53 Ohio St. 686, 44 N. E. 1150; Torbet v. Young, 24 Ohio C. C. R. (n.s.) 97 (Ct. App. 1915).

[68] *Id.*

[69] 22 Ohio St. 372 (1872). Also see Manley v. W. & L. E. Ry. Co., 24 Ohio C. C. R. 70 (1902).

[70] 101 Ohio App. 290, 139 N. E. 2d 485 (1956).

[71] 107 Ohio St. 431, 140 N. E. 340 (1923).

amended petition and held that the amendment affected only the remedy and not the issues a jury would decide. Accordingly, the prior waiver was not expunged.

Where the amendment raises new issues of fact, a party wishing to abandon his waiver as to the old issues of fact in the first petition might be aided by *Raymond v. Railroad Company,*[72] which held that the court will look "wholly to the amended pleadings, *disregarding the original.* . . ." [73] Thus, it might be argued that jury issues waived before the plaintiff's amendment could be tried to a jury because of the amended pleading.

The waiver problem has come up on a demurrer. In *Lingler v. Wesco,*[74] the plaintiff brought a replevin action, after which he took over the property. The defendant's demurrer to the petition was upheld, and the trial court proceeded to award the defendant damages for the plaintiff's wrongful taking. The court held that the plaintiff, who on appeal alleged his right to a jury on the damage issue, had waived his right by not making a jury demand at the time of the hearing on the demurrer, when evidence on the damage issue had been introduced. Thus the court in *Lingler,* which expressly followed *Bonewitz,* extended the waiver doctrine to a time ahead of trial, though the hearing on the damage issue was in effect a "trial."

Before trial, even when an affirmative waiver has been made, a party has not necessarily lost his right if he should change his mind. In *Moknach v. New York Life Ins. Co.,*[75] both parties waived a jury at pre-trial hearing. Later, the plaintiff made a motion for a jury trial, which the trial court sustained to insure that plaintiff might have the benefit of "every legal right." [76] The appellate court affirmed, holding that the matter was in the discretion of the trial court, implying that if the plaintiff had made her motion only to delay the litigation, the trial judge was best able to make such a finding.

D. *Implied Waiver at Trial*

An early case held that once the case is set down to trial with witnesses summoned and "preparation made by the parties

---

[72] 57 Ohio St. 271, 48 N. E. 1093 (1897).

[73] *Id.* at 284.

[74] 79 Ohio St. 225, 86 N. E. 1004 (1906). Cf. Bellows v. Bowlus, 83 Ohio App. 90 (1948).

[75] 67 Ohio App. 293, 36 N. E. 2d 529 (1941).

[76] *Id.* at 294.

to dispense with a jury, . . . *except* in special cases," [77] both parties have waived their right. Modern courts seem, however, to have dropped such a rigid test and have left the question of waiver during the course of the trial to the discretion of the trial judge.[78] But apparently no trial judge has ever granted a demand for a jury after the commencement of trial, and the court in *Hamilton v. Miller*[79] denied a motion for a jury at the end of the first day of trial.

E. *Waiver by Concurrent Motions for Directed Verdicts Abolished*

Prior to 1958 the rule was that when both parties moved for directed verdicts, they waived their right to a jury. But in *Carter-Jones Lumber Co. v. Eblen*[80] the Supreme Court, expressly overruling several of its earlier decisions including *First National Bank v. Hayes*,[81] held that when both parties moved for directed verdicts they did not waive their right to a jury.

G. *The Impracticality of the Waiver Rule*

The waiver rule is impractical because until the trial begins neither the court nor the parties know with any degree of certainty whether there will be a jury trial. Nor is there any more certainty when a party has expressly waived his right, since it has been held that the party may revoke his waiver. Thus under Section 2315.20 courts are unable to plan their trial dockets ahead of time to facilitate the speedy handling of cases. Now, courts and parties must wait until the day of trial to determine whether or not impaneling of jurors will commence.

In that the present rule is so impractical, the legislature or the courts themselves should alter the present waiver rules and adopt a rule similar to Rule 38 of the Federal Rules of Civil Procedure,[82] requiring that the parties demand their right by a certain date.

---

[77] Hauser v. Metzger, 13 Ohio Dec. Rep. 478, 1 Cinc. Super. Ct. Rep. 164, 165 (1871). Emphasis added.

[78] Hamilton v. Miller, 22 Ohio L. Abs. 55 (Ct. App. 1936). But see, Insurance Co. v. Michael, 33 Ohio C. C. R. 477, 14 Ohio C. C. R. (n.s.) 95 (1911).

[79] *Id.*

[80] 167 Ohio St. 189, 147 N. E. 2d 486 (1958). See commentary: 27 U. Cinc. L. Rev. 334 (1958); 28 U. Cinc. L. Rev. 205 (1958); 18 A. L. R. 1433, 108 A. L. R. 1315.

[81] 64 Ohio St. 100, 59 N. E. 893 (1901).

[82] Many states have Rule 38-type statutes. Annot., 64 A. L. R. 2d 506.

Such a statute, by eliminating the need for non-statutory waiver, would thus eliminate the vagueness of any doctrine of "implied" waiver. It would also enable the trial courts to plan their jury dockets ahead of time. Section 2315.20 makes no provision for planning calendars, and under *Bonewitz,* which has filled the void left by the statute, the courts only require the parties to make their demands before trial. Unfortunately, the courts themselves cannot impose a Rule 38-type rule; it requires legislative fiat for reasons set out more fully below.

Attempts by the Legislature and the Judiciary to Change the WAIVER RULE

Statutes designed to relieve the crowded Cuyahoga County trial docket have been held unconstitutional as local legislation not applying to the entire state. In *Silberman v. Hay,*[83] the test case for the first such statute, the defendant requested a jury at the time of the trial. The request was denied because it was not made at least five days before trial in accordance with the Cuyahoga County Jury Law. The Supreme Court, however, granted a new trial with a jury, reasoning that even though the statute applied to all counties of certain class, in fact it would apply only to the largest, Cuyahoga County. Most important, "There is probably in the entire field of legislation, no subject of a more general nature . . . than the right of trial by jury," [84] and most special class legislation which refers to general matters is unconstitutional. The court also dismissed the plaintiff's argument that Cuyahoga County was so unique as to require special legislation, suggesting at the same time that the problem could be solved by increasing the size of the judiciary.

An attempt to change the waiver rule was made by the common pleas court judges of Cuyahoga County. The court-made rule, which was held unconstitutional by the Supreme Court in *Cleveland Ry. Co. v. Halliday,*[85] required each party to demand in writing a twelve-man jury. The defendant urged that the rule did not conflict with the state statutes, and that

---

[83] 59 Ohio St. 582, 53 N. E. 258 (1898). Also see Security Insurance Co. v. Michael, 14 Ohio C. C. R. (n.s.) 95 (1911); Goerlich, Restrictions on the Right of Trial by Jury, 3 Ohio St. L. J. 184 (1937); Annots., 755 A. L. R. 789, 64 A. L. R. 2d 506.

[84] *Id.* at 587.

[85] 127 Ohio St. 278, 188 N. E. 1 (1933). Also see Gertner, The Inherent Powers of Courts to Make Rules, 10 U. Cinc. L. Rev. 32 (1936).

"those statutes cannot be used to impair the judicial power and the inherent rule-making power of the court." [86] The court held that the rule-making power extended to procedural matters only and that a rule regulating the time and the means of waiving a jury trial, dealt with a substantive right.

The court in the *Halliday* case also fell back upon the analogous argument of class legislation, failing to recognize the distinction between antonomous rules made by the common pleas courts of every county and state legislation affecting only one county. Moreover, the court feared that it would give the Cuyahoga County courts power that had been denied the legislature. But the Court overlooked the fact that each county in the state has its own court rules which are often at great variance with other counties.[87]

Thus it has been said that "Ohio has been one of the states which has given only lip service to the doctrine of the inherent rule-making power of courts." [88] Further, Wigmore has argued that when such control is placed in the legislature serious constitutional problems arise concerning the doctrine of separation powers, and furthermore the judiciary is best equipped to determine its own rules.[89]

Yet a serious inroad may have been made on the Supreme Court's reluctance to allow the waiver rule to be changed by *Goldberg Co. v. Emerman.*[90] Here the court upheld the validity of Ohio Revised Code Section 1901.24 which authorizes municipal courts to formulate rules requiring requests for jury trials to be made in writing prior to the trial. The court declared that the statute merely regulated the method of making the demand in the interest of economy and orderly procedure and did not deny a party his right to a jury trial.

Why the legislature may regulate procedure in the *Emerman* case and the county judiciary cannot in the *Halliday* case

---

[86] *Id.* at 281.

[87] Rule 36 of the Cuyahoga County Court of Common Pleas, Rules of Practice [Pollack, Ohio Court Rules Annotated (1949) 200-201] was an example of an attempt to create an effective rule without running afoul of the Halliday case.

[88] Gertner, The Rule-Making Power of Ohio Courts, 1 Ohio St. L. J. 123 (1935). Also see Woodbridge, A History of Separation of Powers in Ohio—A study in Administrative Law, 13 U. Cinc. L. Rev. 191, 288 (1939).

[89] Wigmore, All Legislative Rules for Judiciary Procedure are Void Constitutionally, 23 Ill. L. Rev. 276 (1928-29).

[90] 125 Ohio St. 238, 181 N. E. 19 (1932).

is not understood. Courts, not the legislature, should regulate court procedures. The only explanation for the *Halliday* holding is that the Supreme Court was afraid special court-made rule in Cuyahoga County would upset the uniform application of the constitutional right throughout the state. To be sure, as the Supreme Court pointed out in *Emerman,* it would affect the application of the right, but not the right itself. The Supreme Court failed to recognize that common pleas courts throughout the state have the power to invoke different court rules, many of which affect the application of constitutional rights in different ways.